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No. 04-413

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE CITY OF ALBUQUERQUE,
a municipal corporation, et al.,

Petitioners,

v.

RICK HOMANS and SANDER RUE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE SECRETARIES OF STATES OF IOWA, OREGON, NEW MEXICO AND WISCONSIN IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Amici include the following Secretaries of State: Chester J. Culver of Iowa, Bill Bradbury of Oregon, Rebecca Vigil-Giron of New Mexico, and Douglas La Follette of Wisconsin.[1] *Amici* serve as the chief elections officers of their states, which gives them extensive experience with the issues raised in this case.

Amici seek review of the Tenth Circuit's decision because they believe that it is contrary to this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976). As the chief elections officers in their states, they are particularly concerned about the impact that the Tenth Circuit's decision will have on the ability of States and localities to enact effective reform measures sought by their citizens and legislators. Moreover, *Amici* are concerned about the detrimental impact that the split among the Tenth, Sixth, and Second Circuits will have on their efforts to enact innovative campaign finance laws. As discussed further below, the present uncertainty regarding mandatory spending limits has a chilling effect on the creativity of the State and local governments which should be serving as laboratories of democracy.

If the Tenth Circuit correctly interpreted *Buckley* as imposing a *per se* ban on mandatory campaign spending limits, *Amici* urge this Court to reconsider its holding in *Buckley* and permit Albuquerque to demonstrate that its campaign expenditure limits satisfy constitutional

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity made a financial contribution to the preparation or submission of this brief.

requirements. If such a *per se* ban truly exists as a result of *Buckley*, that ban will stifle the creativity of States and localities in this arena. As the Petitioners demonstrate, the circumstances that led this Court to enact that barrier 28 years ago have changed. This Court should reconsider the extent of First Amendment limits on campaign expenditure laws. *See* Petition for Certiorari at 26-29.

STATEMENT OF THE CASE

This case involves amendments to its city charter that the City of Albuquerque adopted in 1974. These amendments were adopted with the approval of over 90% of the city's voters. *See* Petition for Certiorari at 2. The amendments have succeeded in deterring the appearance of corruption and promoting public confidence in city government. *See id.* at 2-3. As the *Homans* District Court found, limits on campaign contributions alone have been ineffective in achieving those goals in federal elections. *Id.* at 3. Petitioner summarized additional ills attributable to the lack of spending limits in our current system of campaign finance. *See id.* at 3-4.

A split among the circuits exists on this important issue. The Tenth and Sixth Circuits have held that such a barrier exists while the Second Circuit has recently held that *Buckley* does not erect such a barrier. *See* Petition for Certiorari at 11-12. The importance of this issue is demonstrated by studies that show the current degree of cynicism among the population and diminishing voter turnout. Regardless of the actual scope of *Buckley's* holding, *Amici* urge this Court to grant the Petition and remove the cloud over the constitutionality of campaign spending limits.

REASONS FOR GRANTING THE PETITION

Amici urge the granting of the petition for three reasons. The first is the strong citizen desire for reform. That desire has expressed itself in numerous reform efforts. While some State and local legislative bodies have interpreted *Buckley* to allow mandatory campaign spending limits, the available data show that many have not enacted such limits because they believe that *Buckley* bars them. Second, this Court has recognized the benefit of allowing state legislatures – as the laboratories of democracy – to function as unfettered by judicial constraints as reasonably possible. Third, whether or not *Buckley* is correctly read to impose a *per se* barrier, declaring now that no such barrier exists will enable States and localities to address the problem more effectively because more minds will come to bear on the issue.

1. There is a strong appetite for reform and experimentation in State and local governments. This appetite has manifested itself in simple expressions of disappointment with the high cost of campaigns and the perception of corruption that flows from the realities of fundraising. This appetite is manifested in attempts to enact campaign spending limitations at the federal – and, sometimes, State and local – level.

a. The costs of elections at both the Federal and State levels have continued to skyrocket. This trend of rising costs, while evident to the *Buckley* Court in 1976, has continued to increase in the ensuing 28 years. Politicians and commentators alike believe that too much

valuable time is devoted to this ceaseless endeavor to raise funds.[2]

Politicians consider the fundraising process debilitating because it takes away time that could be spent more valuably by serving their constituents. This problem presents itself at the federal and local levels. At the state level, one study has shown that a majority of candidates for statewide office spend at least one-quarter of their time fundraising for their campaigns; nearly one-third of candidates for state legislative office are similarly preoccupied with fundraising.[3]

In addition, numerous Congressmen have recounted their fundraising experiences. For example, one Republican Senator (unnamed) admitted, "I knew Congress well before I came here, but I did not know the amount of time consumed by fundraising and how that encroaches on your ability to work here. It devours one's time – you spend the two or three years before your re-election fundraising. The

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[2] *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising*, 94 COLUMBIA L. REV. 1281 (1994) (stating that candidates spend too much time fundraising) [hereinafter Blasi, *Free Speech*]; *see also id.* at n.1 (citing DAN CLAWSON ET AL., MONEY TALKS: CORPORATE PACS AND POLITICAL INFLUENCE 79, 203-04 (1992); FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 72-73, (1992); BROOKS JACKSON, HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS 69, 91-92, 108 (1990); DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 43-45, 197 (1990); BURDETT LOOMIS, THE NEW AMERICAN POLITICIAN: AMBITION, ENTREPRENEURSHIP, AND THE CHANGING FACE OF POLITICAL LIFE 195-96 (1988); ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 96 (1983)).

[3] Paul S. Herrnson and Ronald A. Faucheaux, *Candidates Devote Substantial Time and Effort to Fundraising* (July 7, 2000), *at* http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html.

other years, you're helping others."[4] Likewise, former House Majority leader Richard Gephardt has also explained that "If you have the need to raise three or four hundred thousand dollars, you're taking an enormous amount of the member's time just to raise money."[5]

The need for politicians to spend huge sums to win elections raises the perception of, and conditions for, corruption. Campaign funds come from special interest groups with legislative agendas. When politicians win elections with these funds and then continue to receive financial backing from these same special interest groups, these politicians will be under pressure to cater to these groups. *See Landell v. Sorrell*, No. 00-9159 (L), 2004 WL 1837394 (2d Cir. Aug. 18, 2004) at *20-*21. Perhaps that is why the phrase "special interest politics" has become so commonplace in our national political discourse.

Politicians routinely confirm that this problem is real. For example, former Rep. Dan Glickman (D-Kan.) admits that "[m]oney has made it more difficult for Democrats to define an economic agenda that is different from the Republican agenda; we are taking from the same contributors."[6] These very reasons are why Congress periodically

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[4] PETER LINDSTROM, CENTER FOR RESPONSIVE POLITICS, CONGRESS SPEAKS: A SURVEY OF THE 100TH CONGRESS 80 (1988).

[5] ELIZABETH DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 51 (1983).

[6] Ken Hechier, *Financing Elections: West Virginia, the States, and the Nation*, 7 W. VA PUBLIC AFFAIRS REPORTER 3 (1990), *available at* http://www.polsci.wvu.edu/ipa/par/report_7_3.html [hereinafter Hechier, *Financing Elections*]. *See also, Free Speech and Campaign Finance Reform: Subcommittee Hearing on the Constitution Before the House Comm. on the Judiciary*, 105th Cong. Sess. 1 (1997) (attaching statement of Gene Karpinski, Executive Director of U.S. Public Interest Research

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considers solutions to free candidates from excessive fundraising obligations.[7]

b. To address this need, which is felt at the State and local levels as much as at the federal level, various State and local governments have enacted – or considered but declined to enact – campaign spending limits. Since this Court's ruling in *Buckley* in 1976, however, legislatures and legal scholars have often viewed mandatory campaign spending limits regulation as *per se* prohibited. In January 1997, Senator Arlen Specter (of Pennsylvania) commented that fundamental campaign finance reform remained impossible without overturning *Buckley*.[8] In

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Group stating "with this kind of influence accorded to big money in our political system, the candidates and the political parties will increasingly look alike on all issues of importance to moneyed interests"), *available at* http://www.house.gov.judiciary/22226.htm [hereinafter Karpinski, *Free Speech and Campaign Finance Reform*].

[7] In 1993, Members of the House of Representatives frequently commented on it. *See, e.g.*, 139 CONG. REC. H10656 (daily ed. Nov. 22, 1993) (remarks of Rep. Gejdenson); *id.* at H10665 (remarks of Rep. Harman); *id.* at H10670 (remarks of Rep. Reed); *id.* at H10671 (remarks of Rep. Hughes); *id.* at H10672 (remarks of Rep. Beilenson); *id.* at H10675 (remarks of Rep. Woolsey); Beth Donovan, *House Takes First Big Step in Overhauling System*, 51 CONG. Q. WKLY. REP. 3246, 3248 (1993); Beth Donovan, *House Will Vote on Limits Nearly $1 Million in '96*, 51 CONG. Q. WKLY. REP. 3091 (1993). *See also* Ruth Marcus & Charles Babcock, *One Day in the Fundraising Trail: Dawn to Dusk/Chasing the Dollars*, THE BOSTON GLOBE, May 16, 1997 at A1 (quoting U.S. Senator Robert Byrd of West Virginia in a March 1997 Senate floor speech: "The incessant money chase that permeates every crevice of our political system is like an unending circular marathon. And it is a race that sends a clear message to the people: that it is money, money, money that reigns supreme in American politics.").

[8] Senator Specter noted in his remarks on the floor of the Senate that a growing group of prominent legal scholars have called for the reversal of Buckley. Karpinski, *Free Speech and Campaign Finance Reform*, *supra* note 6.

(Continued on following page)

advocating for campaign finance reform, he further stated, "I believe that running for office should remain a matter of issues, tenacity, integrity and old-fashioned campaigning. Running for office should not become a simple function of money."[9]

In spite of this adversity, the appetite for reform remains strong, and State and local legislatures have attempted to adopt reforms within the constraints of *Buckley's* perceived *per se* barrier. For example, as noted by The Hoover Institution:

- Since 1990, 30 states have radically changed their campaign finance laws, 17 of them between 1995 and 1998.
- From 1972 to 1996, 45 initiatives and/or referenda, as well as charter amendments on election reform, were placed on state ballots. In 36 of these cases, a majority of voters supported enactment.
- 24 states, as of 1998, have statutes on the books providing some sort of public financing for election campaigns. Also, 12 states and New York City have some form of expenditure limitation.

Indeed, in 1993 "Congressional deliberations, opposition to campaign spending limits has most often been expressed in terms of constitutional concerns." *See* Blasi, *Free Speech*, *supra* note 2, at 1288 (citing Beth Donovan, *Constitutional Doubts Bedevil Hasty Campaign Finance Bill*, 51 CONG. Q. WKLY. REP. 2215, 2217 (1993)); Beth Donavan, *Finance by Gutting Public Funding*, 51 CONG. Q. WKLY. REP. 1534, 1539 (1993); Beth Donavan, *Constitutional Issues Frame Constitutional Options*, 51 CONG. Q. WKLY. REP. 437 (1993).

[9] *Id.*; *see also* John C. Bonifaz, Brenda Wright, and Gregory G. Luke, *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39, 41 (1999) ("Members of Congress have introduced 11 bills since 1976 which would establish campaign spending limits for federal elections.").

- What these various states – and many municipalities – have in common is strong voter sentiment for change, harnessed by diverse grassroots coalitions and reform-minded legislators.[10]

Various state and federal polls confirm that voters are overwhelmingly in favor of more effective campaign finance reform.

- Between 1976 to 1986, campaign spending in West Virginia state Senate races increased an average of 875% from approximately $155,000 to $1,511,000. In 1986, a sample of West Virginia voters were polled regarding whether they believed "there should be a limit on how much a person can spend on running for public office." 75.5% said yes, 16.8% said no, and 7.7% were undecided.[11]

- 64% of Arizonans support public funding for campaigns (Arizona Republic poll, Oct. 2002) and 66% specifically support Clean Elections (KAET poll, June, 2002). 80% of Arizonans believe that

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[10] *Hoover Institution: Public Policy Inquiry, Campaign Finance, State and Local Overview, at* http://www.campaignfinancesite.org/structure/states1.html (last updated Sept. 20, 2004).

[11] Hechier, *Financing Elections*, *supra* note 6. In its 1990 sessions, West Virginia' s House of Delegates "passed, by a vote of 86-14, a constitutional amendment 'to amend the State Constitution to permit the Legislature to limit the amount of money which can be spent advocating or opposing a nomination or election of any candidate, or the passage or defeat of any issue, thing or item to be voted upon at public election.' The elation of supporters of the constitutional amendment, scheduled to be placed on the general election ballot in 1990, was short-lived, however. The state Senate quickly buried the amendment by double referencing it to the Government Organization and Judiciary Committees, where it died without further consideration despite frantic and repeated efforts of the secretary of state to revive it." *Id.*

> contributions influence votes on public policy (Behavior Research Center poll, December, 2001).[12]

2. At various times and in various contexts, this Court has espoused the value of deferring to the legislative process to produce creative solutions to pressing social problems. Indeed, it is a canon of this Court that such cases should be decided narrowly. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 688 (2003). Aside from a constraint on overbroad pronouncements, the benefits to society that flow from allowing our legislatures to conduct the business of policy making through law weigh strongly in favor of clarifying that no *per se* barrier exists. As Justice Brandeis famously observed:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. . . . But in the exercise of this high power, we must ever be on guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

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[12] California Clean Election Campaign, *Arizona – Clean Elections Works! at* http://www.caclean.org/content/victories/az_works.php?path=content/victories/az_works.php&.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion) *cited in Boy Scouts of America and Monmouth Council v. Dale*, 530 U.S. 640, 664 (2000) (Stevens, J., dissenting). *Cf. Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (the "challenging task of crafting procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the states . . . in the first instance.").

This Court should remove the artificial limit on States and localities imposed by a *per se* prohibition on campaign spending limits and, instead, make clear that the proper standard of review of such legislation is and will be meaningful strict scrutiny that is not "'strict in theory, but fatal in fact.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment)).

3. The current split among the circuits on this important issue demonstrates that it should be clarified by this Court. By clarifying *now* that no *per se* barrier is imposed by the First Amendment, this Court will be opening an avenue of reform to the States and localities eager to enact reform that they have avoided because of the belief that *Buckley* imposes a *per se* barrier to campaign spending limits.

Allowing the Tenth Circuit decision to stand deprives citizens who reside within that Circuit of the creativity of the State and local legislatures whose spending limits legislation would surely be struck down. This is likewise the case in the Sixth Circuit in light of the decision in *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

Delaying this clarification will have an impact beyond the Tenth and Sixth Circuits. The perception of a *per se*

barrier constrains the legislative process in States and localities outside of those circuits. The chilling effect that flows from the uncertainty inherent in a circuit split is further compounded by the fact that every panel of circuit judges that has considered this issue has split on the question of whether *Buckley* imposes a *per se* barrier. This effect cannot be ignored.

Amici urge this Court to grant certiorari to decide whether to free our State and local legislatures from the constraints on their ability to experiment in the realm of campaign finance reform that are the byproduct of the belief that the First Amendment imposes a *per se* prohibition on campaign spending limits laws.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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